

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Accu-Check Instrument Service, Inc.,	:	
Plaintiff-Appellee,	:	No. 09AP-505
v.	:	(C.P.C. No. 07CVH05-06901)
Sunbelt Business Advisors of Central Ohio et al.,	:	(REGULAR CALENDAR)
Defendants-Appellants,	:	
Colm O'Driscoll,	:	
Defendant-Appellee.	:	
Accu-Check Instrument Service, Inc.,	:	
Plaintiff-Appellee,	:	No. 09AP-506
v.	:	(C.P.C. No. 07CVH05-06901)
Sunbelt Business Advisors of Central Ohio et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees,	:	
(William C. Eves, Jr.,	:	
Defendant-Appellant).	:	

D E C I S I O N

Rendered on December 24, 2009

Law Offices of Daniel R. Mordarski LLC, and Daniel R. Mordarski; Einstein & Poling, LLC, and Dianne D. Einstein, for appellee.

Reminger Co., LPA, and Jason Winter, for appellants.

APPEALS from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} In this consolidated case, Sunbelt Business Advisors of Central Ohio (individually "SBACO"); SBACO, LLC (referred to individually as "SBACO, LLC," and collectively with SBACO as "Sunbelt," for ease of reference); and William C. Eves, Jr. (individually "Eves"), defendants-appellants (sometimes referred to collectively as "appellants"), appeal the judgment of the Franklin County Court of Common Pleas, in which the court entered judgment in favor of Accu-Check Instrument Service, Inc. ("Accu-Check"), plaintiff-appellee.

{¶2} Robert and Carol Vaughan own a business, Accu-Check. Sunbelt locates buyers for business owners seeking to sell their businesses. In February 2004, the Vaughans contacted Bill Smith, a broker at Sunbelt, for the purpose of finding a buyer for Accu-Check. Smith told the Vaughans that all potential buyers would first sign a confidentiality agreement before any discussions regarding the purchase of Accu-Check. Another broker at Sunbelt, Eves, represented Colm O'Driscoll ("O'Driscoll"), who desired to purchase Accu-Check. Eves had O'Driscoll execute the required confidentiality agreement. After O'Driscoll received financial information regarding Accu-Check,

O'Driscoll and his wife, Kristin, met with the Vaughans in July 2006. O'Driscoll offered to buy Accu-Check for \$750,000, and O'Driscoll and the Vaughans continued to negotiate other details into November 2006.

{¶3} In November 2006, Robert Vaughan learned that Kristin O'Driscoll had told someone about the potential sale of the business. Word of the sale circulated to others, which Vaughan claimed resulted in the loss of business and the loss of a key employee.

{¶4} On May 22, 2007, Accu-Check filed an action against SBACO and O'Driscoll, alleging breach of the confidentiality agreement. Accu-Check claimed SBACO breached its agreement with Accu-Check by failing to have Kristin O'Driscoll sign a confidentiality agreement, and Colm O'Driscoll breached his confidentiality agreement by disclosing confidential information to his wife Kristin. On August 20, 2007, SBACO filed an answer to the complaint and cross-claim against O'Driscoll.

{¶5} On December 24, 2007, Accu-Check filed an amended complaint, adding Kristin O'Driscoll as a defendant. On December 27, 2007, Accu-Check filed a second amended complaint, which merely added exhibits inadvertently not attached to the amended complaint. SBACO never filed answers to the amended complaints.

{¶6} On December 5, 2008, days before trial was scheduled to start, Accu-Check filed a motion for default judgment against SBACO. On December 10, 2008, SBACO filed a motion for leave to file answer to amended complaint instanter and an answer to amended complaint. Counsel for SBACO argued that his failure to file an answer to the second amended complaint had been the result of excusable neglect. Counsel for SBACO indicated he had recently returned from an extended leave due to a serious medical condition, and a legal secretary in his office had been using an illegal

drug on the job while working in his absence, resulting in the total disarray of his case files.

{¶7} On December 12, 2008, Accu-Check voluntarily dismissed its claims without prejudice against Colm and Kristin O'Driscoll. Also on December 12, 2008, the trial court denied SBACO's motion for leave to file an answer instanter. On the same day the trial was to begin, December 15, 2008, the trial court conducted a hearing on Accu-Check's motion for default judgment and granted the motion. The court issued an entry of default on December 16, 2008.

{¶8} A damages only hearing commenced December 15, 2008. At the close of evidence, Accu-Check moved to amend the pleadings to conform to the evidence to include a claim for breach of fiduciary duty and a claim for punitive damages, which the trial court granted. After deliberations, on December 19, 2008, the jury awarded Accu-Check \$1,000,000 in compensatory damages based upon the breach of the non-disclosure agreement, and \$750,000 in punitive damages, plus attorney fees, the total of which was to be determined at a later hearing.

{¶9} On March 20, 2009, Accu-Check filed a motion to add Eves and SBACO, LLC, as defendants. On April 20, 2009, the trial court granted Accu-Check's motion to add Eves and SBACO, LLC, as new-party defendants. Also on April 20, 2009, the court issued a decision granting Accu-Check \$700,000 in attorney fees and \$18,936.54 in itemized expenses. On April 23, 2009, the trial court issued a final judgment against SBACO; SBACO, LLC; and Eves in the amount of \$2,482,029.80, which included post-judgment interest. Sunbelt appeals the judgment of the trial court, asserting the following assignments of error:

1. The punitive damages award is void as a matter of law.
2. The trial court committed reversible error when it refused to allow SBACO to file an answer to Accu-Check's Second Amended Complaint instant and, instead, entered a default judgment against SBACO.

{¶10} Eves also appeals the judgment of the trial court, asserting the following assignments of error:

1. The trial court's April 20, 2009, Decision Granting Plaintiff's Motion To Add William C. Eves And SBACO, LLC As A Party Defendant was unfairly prejudicial as to Eves.
2. The trial court's April 23, 2009, Final Judgment Entry granting Accu-Check judgment as to William C. Eves is void as a matter of law.

{¶11} We will address Sunbelt's second assignment of error first. Sunbelt argues in its second assignment of error that the trial court erred when it denied its motion for leave to file an answer to Accu-Check's second amended complaint instant and, instead, entered a default judgment against it. Accu-Check filed its motion for default judgment pursuant to Civ.R. 55(A), which provides, in pertinent part:

(A) Entry of judgment

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, the party entitled to a judgment by default shall apply in writing or orally to the court therefor[.]

{¶12} Sunbelt filed its motion for leave to file answer to the second amended complaint instant under the authority of Civ.R. 6(B), which provides, in pertinent part:

(B) Time: extension

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any

time in its discretion * * * (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect[.]

{¶13} Thus, a trial court may grant a defendant's motion for leave to file an answer upon a showing of excusable neglect. *Faith Elec. Co. v. Kirk* (May 10, 2001), 10th Dist. No. 00AP-1186. A trial court has broad discretion to grant or deny a motion for leave to file an untimely answer, and the court's judgment will not be reversed on appeal absent a showing of an abuse of that discretion. *Miller v. Lint* (1980), 62 Ohio St.2d 209, 214. The trial court's discretion in this matter, however, is not unlimited, but requires a determination as to whether the neglect was excusable or inexcusable. *Id.* In making this determination, the Supreme Court of Ohio has stated that the trial court must take into consideration all the surrounding facts and circumstances, and courts must be mindful of the admonition that cases should be decided on their merits, where possible, rather than procedural grounds. *Marion Prod. Credit Assn. v. Cochran* (1988), 40 Ohio St.3d 265, 271. Generally, default judgments are disfavored. *Suki v. Blume* (1983), 9 Ohio App.3d 289, 290. Granting a default judgment, analogous to granting a dismissal, is a harsh remedy that should be imposed only when the actions of the defaulting party create a presumption of willfulness or bad faith. *Haddad v. English* (2001), 145 Ohio App.3d 598, 603.

{¶14} Although excusable neglect cannot be defined in the abstract, the test for excusable neglect under Civ.R. 6(B) is less stringent than that applied under Civ.R. 60(B). *State ex rel. Lindenschmidt v. Butler Cty. Bd. of Commrs.*, 72 Ohio St.3d 464, 466, 1995-Ohio-49. Such a standard is notably forgiving. *Hillman v. Edwards*, 10th Dist. No. 08AP-1063, 2009-Ohio-5087, ¶14, citing *Columbus v. Kahrl* (Mar. 12, 1996), 10th Dist. No.

95APG09-1204. However, the inaction of a defendant is not excusable neglect if it can be labeled as a complete disregard for the judicial system. *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 20, 1996-Ohio-430. "Neglect" as it relates to Civ.R. 6(B) has been defined as conduct that falls substantially below what is reasonable under the circumstances. *State ex rel. Weiss v. Indus. Comm.*, 65 Ohio St.3d 470, 473, 1992-Ohio-71, citing *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 152.

{¶15} In the present case, in its decision denying SBACO's motion for leave to file an answer to the second amended complaint, the trial court found that the circumstances outlined by SBACO's counsel did not constitute excusable neglect. The court stated that SBACO's failure to seek leave to answer until almost one year after the complaint was amended and until after Accu-Check applied for default judgment was not the result of excusable neglect. The court further reasoned that it appeared that SBACO failed to monitor its obligations in the litigation for an extended period of time even after counsel's health issues had passed.

{¶16} After a review of the record, we find the trial court abused its discretion when it denied SBACO's motion for leave to file an answer to the second amended complaint. In its motion, SBACO indicated that, at the time of the filing of the amended complaints, counsel for SBACO had been unable to work full-time due to a serious illness that lasted several months and required counsel to take powerful pain medications. After returning to full-time work, counsel discovered that a legal secretary had not performed properly, or not at all, her job responsibilities as directed by counsel. Counsel stated that it was not until the first week of December 2008 that, while reviewing the court docket sheet, he saw that amended complaints had been filed. The legal secretary had failed to

place the amended complaints in the case file. Counsel then began a search for the amended complaints, which lasted several days and involved looking through hundreds of files. Counsel discovered that the legal secretary had failed to properly file many other documents, as well. Counsel eventually discovered the amended complaints, the O'Driscolls' answer, and correspondences regarding the same in a wholly unrelated file.

{¶17} Thereafter, counsel began drafting the motion for leave to file an answer to the second amended complaint, as well as the answer to the second amended complaint. Before completing these documents, on Monday, December 8, 2008, counsel discovered a copy of the motion for default judgment filed by Accu-Check, which had been faxed to his office after the close of business on Friday, December 5, 2008.

{¶18} Counsel indicated in his motion for leave to file an answer to the second amended complaint that it was only after recovering from his illness and returning to full-time practice that he discovered the secretary's job failures. Attached to the motion for leave was an affidavit from the secretary's mother, a paralegal at another law office, who averred that during the time of counsel's illness, her daughter was taking the illegal drug "ecstasy" while working. She further averred that she had tried to "clean up the mess" her daughter had made, and what she found was a "disaster." She stated legal documents were misfiled or misplaced on a consistent basis, which made addressing problems with files extremely difficult. As of December 10, 2008, she had still been unable to clean up the "disaster" even though both she and counsel had made diligent efforts to identify the problems with the files and correct the same. She stated that she took her daughter for evaluation and treatment for her drug problem.

{¶19} In his motion for leave, counsel for SBACO further indicated that it was not until the legal secretary was fired that he fully understood the extent of the problems with the files. Despite the diligent efforts of him and his new staff members over the course of several months, given the large volume of active case files, many of the problems caused by the legal secretary's acts were not immediately discovered.

{¶20} We find these circumstances constituted "excusable neglect" within the meaning of that phrase in Civ.R. 6(B). Counsel's extended serious illness, when coupled with the use of an illegal drug by the employee in charge of maintaining case files in his absence, provides sufficient demonstration that his neglect in failing to file a timely answer to the second amended complaint was excusable. As indicated above, we are required to be mindful of the admonition that cases should be decided on their merits, where possible, rather than procedural grounds. We also see no prejudice resulting from the granting of SBACO's motion for leave to file an answer to the second amended complaint. SBACO was fully active in the case since its inception, with both sides consistently defending their positions, and it cannot be said that Accu-Check would be surprised by SBACO's intention to defend the action. SBACO filed an answer to Accu-Check's original complaint, and this complaint was based upon the same facts and events as the second amended complaint. See *Sidenstricker v. Miller Pavement Maintenance, Inc.*, 10th Dist. No. 00AP-1146, 2001-Ohio-4111 (plaintiff's original and amended complaints were substantially the same; thus, plaintiff could not claim that he was surprised or misled). SBACO also participated in all aspects of the proceedings, including filing pleadings and motions, attending hearings, obtaining witnesses for trial, exchanging discovery, and attending depositions. There is also no evidence, or even any claim by

Accu-Check's counsel, that the failure of SBACO to file a timely answer impeded its representation of its client, and we see no strategic advantage gained by SBACO if it were allowed to file an answer to the second amended complaint. See, e.g., *Sidenstricker* (absence of a timely answer to the amended complaint did not give an unfair strategic advantage to defendants, plaintiff identified no prejudice which he suffered by the late filing of defendants' answer to the amended complaint, and the parties' ability to litigate the issues was not impeded to any degree by defendants' failure to timely answer plaintiff's amended complaint). Accu-Check's motion for default judgment was also filed only days before trial was to commence, and both parties appeared fully prepared to begin trial proceedings. SBACO's actions also clearly did not create any presumption of willfulness or bad faith, see *Haddad* at 603, and cannot come close to being labeled as a complete disregard for the judicial system, see *Kay* at 20. We find counsel's actions were not so derelict so as to substantially fall below what was reasonable.

{¶21} Furthermore, the final judgment in this case was over \$2,500,000. This court has acknowledged that courts in Ohio have adhered to the observation of the federal courts that matters involving large sums of money should not be determined by default judgments if it can reasonably be avoided. See *Estate of Orth v. Inman*, 10th Dist. No. 99AP-504, 2002-Ohio-3728, ¶30, citing *United States v. Williams* (D.C.Ark.1952), 109 F.Supp. 456, 461. See also *Colley v. Bazell* (1980), 64 Ohio St.2d 243, 247, fn. 5. Given SBACO's filing of an answer to the original complaint, its active participation in the litigation over a long period, the absence of any flagrant disregard for the rules, and the lack of any prejudice in allowing leave to file an answer to the second amended complaint, we find this principle compelling under the circumstances here.

{¶22} We also note SBACO's motion for leave was not filed until after Accu-Check had already filed its motion for default judgment. It is true that such is typically a factor militating against the granting of leave to file. See *Marion Prod.* at 272 ("of great importance, is the fact that the [plaintiffs] failed to file their motion for default until after [defendant] pointed out the lack of a reply in its motion * * * for leave to file a reply instanter. * * * Until a motion for default is filed, it is presumed that the complaining party is not entitled to a default judgment, which fact serves to enlarge the discretion of the trial court to allow a delayed responsive pleading"). However, SBACO's motion for leave explained that its counsel had just recently discovered the failure to file an answer and had actually been working on an answer and motion for leave at the time Accu-Check filed its motion for default judgment. Thus, the fact that SBACO filed its motion for leave after Accu-Check filed its motion for default judgment is less significant under these circumstances.

{¶23} Finally, we note Accu-Check argues that this court should not be permitted to review the trial court's entry denying leave to file an answer and the entry granting a default judgment because Sunbelt failed to identify these entries in its notice of appeal, in which it referenced only the trial court's final judgment dated April 23, 2009. Although App.R. 3(D) provides that a notice of appeal shall designate the judgment, order or part thereof appealed from, it does not require an appellant to separately identify each interlocutory order issued prior to a final judgment. *Beatley v. Knisley*, 10th Dist. No. 08AP-696, 2009-Ohio-2229, ¶9 (citing App.R. 3(D)). Interlocutory orders are merged into the final judgment; thus, an appeal from the final judgment includes all interlocutory orders merged with it. *Grover v. Bartsch*, 170 Ohio App.3d 188, 2006-Ohio-6115, ¶9. A

trial court's decision to grant or deny leave to file an answer instanter is not a final appealable order, but is interlocutory. *Karlen v. Carfangia* (June 2, 2001), 11th Dist. No. 2000-T-0081, citing *Karlen v. Carfangia* (Feb. 5, 1999), 11th Dist. No. 98-T-0206. Likewise, the entry of default judgment on issue of liability alone is not a final appealable order. *Pinson v. Triplett* (1983), 9 Ohio App.3d 46. Because the December 12, 2008 entry denying SBACO's motion for leave to file an answer instanter and the entry of default on December 16, 2008 were interlocutory orders, Sunbelt could challenge these entries even though it only identified the April 23, 2009 final judgment in its notice of appeal.

{¶24} For the foregoing reasons, we find the trial court abused its discretion when it denied SBACO's motion for leave to file an answer to Accu-Check's second amended complaint. Given this finding, we also find the trial court erred when it granted default judgment to Accu-Check based upon Sunbelt's failure to plead, pursuant to Civ.R. 55. The trial judge who granted the default judgment, who was sitting in place of the original judge, indicated that he felt he had no other choice than to grant the default judgment because the original judge had already denied SBACO's motion for leave to file an answer to the second amended complaint. The judge indicated he felt he was in an "awkward" position and was forced to grant the default judgment because he was left with the second amended complaint with no answer. Accordingly, Sunbelt's second assignment of error is sustained.

{¶25} Sunbelt argues in its first assignment of error that the trial court's punitive damages award was void as a matter of law. As we have sustained Sunbelt's second assignment of error, and the judgment must be reversed and the matter remanded to permit Sunbelt to file an answer to Accu-Check's second amended complaint, any

arguments regarding the award of punitive damages after the default judgment is premature. If, upon remand, it is determined that Sunbelt is not liable, the issue of the propriety of punitive damages would be moot, and any determination by this court with regard to punitive damages at this stage would then be rendered unnecessary. If, however, Sunbelt is found liable, any error with regard to that determination, as well as any argument with regard to the propriety of the punitive damages award, could be appealed together and determined in a single appeal. The Supreme Court of Ohio has repeatedly voiced its desire to avoid piecemeal litigation in our court system. See *Denham v. New Carlisle*, 86 Ohio St.3d 594, 597, 1999-Ohio-128, citing *Gen. Elec. Supply Co. v. Warden Elec., Inc.* (1988), 38 Ohio St.3d 378, 380-82. Therefore, because the arguments regarding punitive damages are not ripe for review at this stage, we will not address them in this appeal.

{¶26} As to Eves' assignments of error, Eves argues in his first assignment of error that the trial court's April 20, 2009 decision granting Accu-Check's motion to add Eves and SBACO, LLC, as party defendants was unfairly prejudicial as to Eves. Eves argues in his second assignment of error that the trial court's April 23, 2009 final judgment entry granting Accu-Check judgment as to Eves is void as a matter of law. Given our reversal of the trial court's final judgment, as discussed in Sunbelt's second assignment of error above, we therefore also reverse the final judgment as it pertains to the addition of Eves and SBACO, LLC, as party defendants. The trial court's decision to permit the addition of these parties was based, in part, upon Civ.R. 15, which provides for amendment of the pleadings to conform to the evidence, as well as the rationale that it would be unjust to permit Eves and SBACO, LLC, to avoid responsibility for Eves' own

acts that created the breach of fiduciary duty. As liability must be redetermined upon remand and new evidence introduced, the trial court should re-address this issue based upon any changed evidence or circumstances discovered upon remand. Therefore, we reverse the trial court's judgment as it pertains to the addition of Eves and SBACO, LLC, as party defendants, although not for the reasons propounded by Eves in his assignments of error. For these reasons, Eves' first and second assignments of error are sustained, albeit upon different grounds than asserted by Eves.

{¶27} Accordingly, we do not address Sunbelt's first assignment of error, its second assignment of error is sustained, and Eves' first and second assignments of error are sustained. Therefore, the judgment of the Franklin County Court of Common Pleas is reversed, and this matter is remanded to that court for proceedings consistent with this decision.

*Judgment reversed;
cause remanded with instructions.*

FRENCH, P.J., and CONNOR, J., concur.
